No. 86-677

Supreme Court, U.S.
FILED
OCT 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

SEARS, ROEBUCK AND CO.,
Petitioner,

VS.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LATHAM, WATKINS & HILLS
IRWIN GOLDBLOOM
(Attorney of record)
MAUREEN E. MAHONEY
SCOTT G. KNUDSON
1333 New Hampshire Ave., N.W.
Suite 1200
Washington, D.C. 20036
(202) 828-4400

STEPHEN D. MILLER, INC.
STEPHEN D. MILLER
GEORGE W. BUEHLER
DAVID G. MEYER
8912 W. Olympic Boulevard
Beverly Hills, California 90211
(213) 858-8282

Attorneys for Petitioner
Sears, Roebuck and Co.

Bowne of Los Angeles, Inc., Law Printers (213) BOWNE CO

QUESTION PRESENTED FOR REVIEW

Whether it is appropriate to imply an exception to the statute of limitations, 18 U.S.C. § 3282, to permit the filing of a superseding indictment after the limitations period has expired where the charges contained in the superseding indictment (1) expose the defendant to significantly higher penalties than the statutory offense originally charged and (2) significantly expand the avenues of proof available to the Government to obtain a conviction.

PARTIES BELOW

The parties below, as shown in the caption of this case, are Sears, Roebuck and Co. and the United States of America. A list of the subsidiaries and affiliates of Sears, Roebuck and Co. is set forth in the Appendix.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Opinions Below	1
Grounds for Jurisdiction	2
Statutes Involved	2
I	
STATEMENT OF THE CASE	4
A. The Original Indictment	6
B. The Superseding Indictment	8
C. The Rulings Below	9
II	
REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI	10
A. The Standards Governing Amendments to Indictments	10
B. The Decision of the Ninth Circuit	12
C. The Decision of the Ninth Circuit is In Conflict With Precedent of this Court	13
D. Review of the Important Federal Issue Presented Would Facilitate the Administration of the Criminal Justice System	17
III	
THE DECISION BELOW IS RIPE FOR REVIEW	18
Conclusion	20

INDEX TO APPENDICES

		Page
Appendix A.	Opinion	A-1
Appendix B.	Order Dismissing First Superseding Indictment	B-1
Appendix C.	Order	C-1
Appendix D.	Indictment	D-1
Appendix E.	First Superseding Indictment	E-1
Appendix F.	Subsidiaries and Affiliates of Sears, Roebuck and Co.	F-1

TABLE OF AUTHORITIES

Cases

Page

Blockburger v. United States, 284 U.S. 299 (1932) 15, 16

Brown v. Ohio, 432 U.S. 161 (1977) 17

Estelle v. Gamble, 429 U.S. 97 (1976) 18

Fong Foo v. United States, 369 U.S. 141 (1962) ... 18, 19

Forsyth v. City of Hammond, 166 U.S. 506 (1897) 18

Harris v. Oklahoma, 433 U.S. 682 (1977) 17

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 19

Montgomery Ward & Co., Inc. v. Zenith Radio Corp., 673 F.2d 1254 (C.C.P.A. 1982) 5

Stirone v. United States, 361 U.S. 212 (1960) 10, 11, 12, 13, 14, 15, 17

United States v. Banks, 682 F.2d 841 (9th Cir. 1982), *cert. denied*, 459 U.S. 117 (1983) 13, 14

United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983) 13, 14

United States v. Cevallos, 574 F.2d 854 (5th Cir. 1978) 11

United States v. Continental Forwarding Co., 463 F.2d 1129 (C.C.P.A. 1972) 4

United States v. Durkee Famous Foods, Inc., 306 U.S. 68 (1939) 13

United States v. Edwards, 777 F.2d 644 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 1644 (1986) 17

United States v. Friedman, 649 F.2d 199 (3d Cir. 1981) 11, 17

Table of Authorities

Cases

Page

United States v. Garcia, 412 F.2d 999 (10th Cir. 1969) 11, 17

United States v. Grady, 544 F.2d 598 (2d Cir. 1976) 11, 12, 17

United States v. Habig, 390 U.S. 222 (1968) 11

United States v. Marion, 404 U.S. 307 (1971) 11, 17

United States v. Miller, 471 U.S. 130 (1985) 17

United States v. Pacific Steel and Supply Co., slip op. (N.D. Cal. September 25, 1981), *aff'd* sub nom. *United States v. Teraoka*, 669 F.2d 577 (9th Cir. 1982) 7

United States v. Rose, 570 F.2d 1358 (9th Cir. 1978) 12, 15, 16

United States v. Sears, Roebuck & Co., Inc., 518 F. Supp. 179 (C.D. Cal. 1981), *rev'd* 719 F.2d 1386 (9th Cir. 1983), *cert. denied*, 465 U.S. 1079 (1984) 7

United States v. Sears, Roebuck & Co., Inc., 778 F.2d 810 (D.C. Cir. 1985) 5

United States v. Sears, Roebuck & Co., Inc., 785 F.2d 777 (9th Cir. 1986) 9, 13, 15

United States v. Stirone, 262 F.2d 571 (3d Cir. 1958), *aff'g* 168 F. Supp. 490 (W.D. Pa. 1957) 14

United States v. Wilsey, 458 F.2d 11 (9th Cir. 1972) 17

TABLE OF AUTHORITIES

CASES

	Page
United States v. Woodward, 469 U.S. 105 (1985) ...	16
Zenith Radio Corp. v. Matsushita Electric Indus. Co., 513 F. Supp. 1100 (E.D. Pa. 1981), *aff'd in part and rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd in part*, 106 S.Ct. 1348 (1986)	4

Other Authorities

18 U.S.C. § 542 .....2, 5, 6, 7, 8, 9, 12, 13, 15, 16
18 U.S.C. § 1001 .....3, 5, 9, 12, 13, 15, 16
18 U.S.C. § 1951 .....11, 14
18 U.S.C. § 3282 ..... i, 3, 6
18 U.S.C. § 3288 .....3, 6, 7, 8, 12
19 U.S.C. § § 160 *et seq.* 9, 13
19 U.S.C. § 1500 15
19 U.S.C. § 1673 15
28 U.S.C. § 1254 .....2, 18

No. 86-.....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

SEARS, ROEBUCK AND CO.,
Petitioner,

VS.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Sears, Roebuck and Co., petitioner herein, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported as *United States v. Sears, Roebuck & Co., Inc.*, 785 F.2d 777 (9th Cir. 1986), and is set forth in the Appendix hereto at A-1. The district court issued an order dismissing the superseding indictment against petitioner without filing an opinion. The order of the district court is set forth in the Appendix at B-1.

GROUNDS FOR JURISDICTION

The opinion below was filed by the court of appeals on March 25, 1986. The court of appeals denied Sears' Petition for Rehearing and Suggestion for Rehearing *En Banc* on August 20, 1986. Pursuant to Rule 20.1 of this Court, this petition was filed within sixty days of the date rehearing was denied. This Court has jurisdiction to consider this petition pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The question presented in this petition involves consideration of the following statutes, the complete texts of which are set forth below:

1. 18 U.S.C. § 542:

> Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of any lawful duties; or
>
> Whoever is guilty of any willful act or omission whereby the United States shall or may be deprived of any lawful duties accruing upon merchandise embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission —

Shall be fined for each offense not more than $5,000 or imprisoned not more than two years, or both.

Nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law.

The term "commerce of the United States", as used in this section, shall not include commerce with the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

2. 18 U.S.C. § 1001:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

3. 18 U.S.C. § 3282:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

4. 18 U.S.C. § 3288:

Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, or an indictment or information filed after the defendant waives in open court prosecution by indict-

ment is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations.

I

STATEMENT OF THE CASE

In 1968 the United States Customs Service and importers of Japanese television receivers, including Sears, Roebuck and Co., became mired in a complex controversy now spanning two decades. The controversy has centered upon the appropriate methods for reporting prices and calculating values for imported Japanese television receivers. *See generally United States v. Continental Forwarding Co.,* 463 F.2d 1129 (C.C.P.A. 1972) (rejecting Customs' efforts to require importers to enter goods at a price higher than the actual price paid); *Zenith Radio Corp. v. Matsushita Electric Indus. Co.,* 513 F. Supp. 1100, 1307 (E.D. Pa. 1981) (observing that Customs "preferred to ignore" the actual price paid in Japan in order to collect a higher *ad valorem* duty), *aff'd in part and rev'd in part,* 723 F.2d 238 (3d Cir. 1983), *rev'd in part,* 106 S. Ct. 1348 (1986). Before the industry-wide controversy concluded, the Government initiated a criminal investigation of Sears in response to complaints of an American television manufacturer. On February 26, 1980, just months before the statute of limitations would have

expired, Sears was indicted for alleged violations of 18 U.S.C. § 542 (hereinafter "§ 542") prohibiting the entry of imported merchandise into the commerce of the United States by means of false statements. The indictment related to the accuracy of the pricing information submitted by Sears as early as 1966.

Shortly after the indictment of Sears, the controversy culminated in an industry-wide settlement of claims for duties allegedly owed by importers and manufacturers of Japanese television receivers. *See Montgomery Ward & Co., Inc. v. Zenith Radio Corp.*, 673 F.2d 1254 (C.C.P.A. 1982) (upholding the validity of the settlement and rejecting the claims of the American manufacturers that the amount of the settlement was arbitrarily low); *United States v. Sears, Roebuck & Co., Inc.*, 778 F.2d 810 (D.C. Cir. 1985) (affirming district court judgment holding that the United States had improperly sought to hold Sears liable for more than its negotiated share of the industry-wide settlement).

Thereafter, the Government did not proceed to trial against Sears on the 1980 indictment. That indictment was dismissed initially by the district court based on the abusive conduct of the prosecutor in presenting the matter to the grand jury. This ruling was reversed by the Ninth Circuit, after which the Government voluntarily dismissed the 1980 indictment because it conceded that, as a matter of law, it could not prove the facts necessary to establish the alleged violations of § 542. On January 17, 1984, nearly four years after the original indictment was issued, and long after the statute of limitations had expired, the grand jury returned a superseding indictment. This new indictment charged Sears with engaging in conduct in violation of a different statute, 18 U.S.C. § 1001 (hereinafter "§ 1001"), and with a different conspiracy. The Government asserted, and the Ninth Circuit

found, that it was permissible to imply an exception to the statute of limitations which would permit prosecution under the new charges contained in the superseding indictment. This exception was implied even though there was an express savings statute, 18 U.S.C. § 3288, of which the Government had failed to avail itself several years earlier when the 1980 indictment was dismissed.

The exception implied by the Ninth Circuit is in conflict with the precedents of this Court, as well as the equitable principles of repose codified in the statute of limitations, 18 U.S.C. § 3282. Unless this Court grants certiorari, Sears will be made to stand trial for a different statutory offense than that originally charged, twenty years after the first acts originally alleged to be criminal. The statute of limitations and this Court's interpretive precedents prohibit such a result.

A. The Original Indictment

On February 26, 1980, the Government filed a thirteen count indictment ("the original indictment") against Sears. The original indictment charged Sears with twelve counts of entering and introducing into the commerce of the United States Japanese manufactured television receivers by means of false statements in violation of § 542, and one count of conspiring with Tokyo Shibaura Electric Co. ("Toshiba") and Sanyo Electric Co., Ltd. ("Sanyo") to defraud the United States and violate § 542 by misrepresenting the purchase prices of the imported television receivers. The specific objects of the conspiracy were identified as (a) the circumvention of certain regulations of the Japanese government on the export of television sets from the country, and (b) the filing of false documents with the United States government which misstated the purchase price of the imported television receivers. Appendix at D-1.

The Japanese export regulations referred to in the original indictment were a system of minimum export price restrictions, known as "check prices," imposed by the Japanese Ministry of International Trade and Industry (hereinafter "MITI") upon a wide variety of merchandise. In theory, MITI refused to issue an export license for merchandise unless the exporter documented a sales price equal to or higher than the check price. The original indictment charged Sears with conspiring with Japanese manufacturers to make false statements on customs' documents to avoid the MITI check price system.

On June 1, 1981, the district judge in the case dismissed the indictment on the basis of the highly irregular and improper conduct of the prosecutor while presenting the case to the grand jury. *United States v. Sears, Roebuck & Co., Inc.*, 518 F. Supp. 179 (C.D. Cal. 1981), *rev'd* 719 F.2d 1386 (9th Cir. 1983), *cert. denied*, 465 U.S. 1079 (1984). Shortly thereafter, the District Court for the Northern District of California issued a decision in *United States v. Pacific Steel and Supply Co.*, slip op. (N.D. Cal. September 25, 1981), *aff'd* sub nom. *United States v. Teraoka,* 669 F.2d 577 (9th Cir. 1982), holding that a violation of § 542 could only be established upon proof that the importer would not have been permitted to enter the goods in question into the United States but for the false statements made on the customs documents. Since the television receivers could have been imported into the United States regardless of the truth of the price information being reported, this decision established that the Government would not be able to prove that Sears violated § 542, the crimes charged in the 1980 indictment.

Under 18 U.S.C. § 3288, a savings statute designed to extend the statute of limitations when indictments have been dismissed on any ground, including defects in the grand jury process, the Government could then have

sought a superseding indictment under a different statute without regard to the prior expiration of the statute of limitations. Instead, the Government appealed the dismissal of the original indictment, despite the fact that it knew that regardless of the outcome of the appeal, the indictment was legally defective under § 542. The district court's ruling was ultimately reversed, although the panel "deplore[d]" the prosecutor's "abusive" and inflammatory" conduct. 719 F.2d at 1390, 1393.

B. The Superseding Indictment

After foregoing the six-month period allowed by § 3288 to defend an indictment procured by "abusive" and "inflammatory" conduct, the Government in late 1983 sought a superseding indictment under an implied exception to the statute of limitations. The Government explained its reasons for seeking the superseding indictment to the grand jury as follows:

> "We cannot proceed on the indictment as it presently is because of the Court of Appeals. 542, the statute that was in question cannot be used if the goods are not subject — if they are not prohibited or restricted. 1001 relates to statements made to federal agents that are false. It encompasses importation and other times, false statements. It is a *more general statute.*" (Grand Jury Transcript, 12/7/83 at 12-13; emphasis added).

On January 17, 1984, the Government filed the superseding indictment. The superseding indictment deleted all references to the entry of goods in violation of § 542 as a purpose of the conspiracy and also deleted the circumvention of Japanese MITI regulations as an object of the conspiracy. Instead, the superseding indictment added allegations that Sears conspired to avoid the imposition of special dumping duties under the Anti-Dumping Act,

19 U.S.C. §§ 160 *et seq.* It also added the allegation, not contained in the original indictment, that the object of the conspiracy was to file false statements concerning the price of the imported television receivers to avoid the application of the Anti-Dumping Act and the imposition of special dumping duties. In effect, the superseding indictment substituted a conspiracy to avoid special dumping duties for one aimed at avoiding the Japanese MITI regulations.

The superseding indictment amended the substantive counts by replacing the 12 alleged violations of § 542 with 12 alleged violations of § 1001. The penalty for violating § 1001 is a fine of up to $10,000 or imprisonment for up to five years, or both. A violation of § 542 carries a maximum punishment of only a $5,000 fine and two years' imprisonment.

C. The Rulings Below

Given these fundamental amendments to both the conspiracy and the substantive counts, the district court ruled that the superseding indictment was barred by the statute of limitations. In a cursory opinion the Ninth Circuit reversed, implying an exception to the statute of limitations in conflict with the precedents of this Court. The Ninth Circuit found that the amendment of the indictment was permissible because "all the elements of a section 1001 prosecution are included in a section 542 charge." 785 F.2d at 779. Sears' petition for rehearing and suggestion for rehearing *en banc* was denied by the Court of Appeals on August 20, 1986.

II

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

In determining that the Government's superseding indictment was not barred by the statute of limitations, the Ninth Circuit reached a result contrary to this Court's decision in *Stirone v. United States,* 361 U.S. 212, 217 (1960), which prohibited any amendments to indictments except those which are "trivial, useless, [or] innocuous." The Ninth Circuit permitted the Government to broaden the charges brought against Sears by filing a superseding indictment after the statute of limitations had run, which (1) exposed Sears to significantly higher penalties and (2) significantly expanded the avenues of proof available to the Government to obtain a conviction. The Court should grant Sears' writ of certiorari to resolve the conflict between the Ninth Circuit's decision and precedent of this Court and to address an important and recurring question of federal law affecting the efficient administration of criminal justice.

A. The Standards Governing Amendments to Indictments

A defendant may be prosecuted only on charges contained in an indictment brought within the period provided by the statute.[1] A statute of limitations "represent[s] legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they 'are made for the repose of society and the protection of those who may [during the limita-

---

[1]The limitations period applicable to this case is five years. The acts forming the basis of the original indictment allegedly took place as early as 1966, 14 years before the grand jury returned that indictment.

tion] . . . have lost their means of defense.' " *United States v. Marion*, 404 U.S. 307, 322 (1971) (quoting *Public Schools v. Walker*, 76 U.S. 282, 288 (1870)). *See also United States v. Habig*, 390 U.S. 222, 227 (1968) (favoring the liberal application of statutes of limitations). A statute of limitations restricts exposure to possible prosecution to a fixed time, after which "there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." *Marion*, 404 U.S. at 322. Although the return of an indictment tolls the statute of limitations pertaining to the charges brought in the indictment, *United States v. Cevallos*, 574 F.2d 854, 855 (5th Cir. 1978); *United States v. Garcia*, 412 F.2d 999, 1000 (10th Cir. 1969), the Government is not permitted to use a superseding indictment to broaden or substantially to amend the charges made in the first indictment. *See United States v. Friedman*, 649 F.2d 199, 204 (3d Cir. 1981); *United States v. Grady*, 544 F.2d 598, 602 (2d Cir. 1976).

The primary case in which this Court has addressed the question of what constitutes an impermissible broadening of an indictment is *Stirone v. United States*, 361 U.S. 212 (1960). In *Stirone* the defendant was indicted and convicted of unlawfully interfering with interstate commerce in violation of 18 U.S.C. § 1951. The indictment charged the defendant with extortion that interfered with the interstate shipment of sand to be used to construct a steel mill. At trial the Government tried to obtain a conviction on proof that the defendant's conduct interfered either with interstate shipments of sand or with the steel mill's future shipments of steel. The Court unanimously reversed the conviction on the ground that the indictment had been unconstitutionally broadened, stating that "the addition charging interference with steel exports here is neither trivial, useless, nor innocuous." *Id.* at 217. Although *Stirone* involved the unconstitutional broadening

of an indictment at trial, the lower courts have embraced *Stirone* as a guide in determining whether a superseding indictment brought after the running of an otherwise applicable statute of limitations was impermissibly broadened. *See, e.g., Grady,* 544 F.2d at 602.

B. The Decision of the Ninth Circuit

The Ninth Circuit's decision in this case is completely contrary to this Court's determination in *Stirone.* As the district court found, the differences between the original and superseding indictments against Sears were anything but trivial, useless or innocuous. In the superseding indictment, the Government changed the object of conspiracy and shifted the 12 substantive counts from alleging violations of § 542 to alleging violations of § 1001. These changes not only altered the nature of the proof required, but exposed Sears to a greater penalty on each substantive count.

The Ninth Circuit tried to circumvent the holding in *Stirone* by reasoning that the Government did not broaden or expand the charges brought against Sears when it shifted the indictment from being based on a specific customs statute, § 542, to the general false statement statute, § 1001. The court reached this conclusion on the grounds that § 1001 was a lesser included offense of a § 542 violation, citing to a prior decision of that circuit, *United States v. Rose,* 570 F.2d 1358 (9th Cir. 1978).[2] The fact that § 1001 carried with it a greater potential penalty

---

[2]The Government could have availed itself of the savings statute, 18 U.S.C. § 3288, if it had reindicted Sears within six months after the first indictment had been dismissed by the district court. Instead, the Government chose to appeal the trial court's dismissal, and then brought the superseding indictment at issue here in circumstances where 18 U.S.C. § 3288 was inapplicable. This Court has indicated that the savings statute should be strictly interpreted as a safe

was dismissed by the Ninth Circuit as not substantively changing the indictment, relying on case law involving prosecutorial vindictiveness to support its conclusion. *See United States v. Sears, Roebuck & Co., Inc.*, 785 F.2d 777, 779 (9th Cir. 1986) (*citing* to *United States v. Brooklier*, 685 F.2d 1208 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983) and *United States v. Banks*, 682 F.2d 841 (9th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983)). The court below also admitted that the superseding indictment changed the object of the conspiracy, but concluded without analysis that the charge nevertheless had not been broadened, except for an additional reference to the Anti-Dumping Act, 19 U.S.C. §§ 160 *et seq.*, and to anti-dumping duties. *Id.*

C. The Decision of the Ninth Circuit is In Conflict With Precedent of this Court

The Ninth Circuit's reasoning conflicts with this Court's decision in *Stirone* in two important respects. First, logic and common sense suggest that a superseding indictment based on a statute permitting greater penalties is fundamentally broader than an original indictment based on a statute permitting lesser penalties. Section 1001 permits a maximum penalty of five year's imprisonment and a $10,000 fine per violation; § 542 permits only a two-year term of imprisonment and a $5,000 fine per violation. Twelve substantive counts of violating § 1001 were charged under the superseding indictment, meaning that an individual would have faced a maximum penalty of 60 years in prison and $120,000 in fines if convicted on all 12 § 1001 counts, versus 24 years in prison and $60,000 in fines for conviction on 12 counts of violating § 542. A corporate defendant like Sears, while not subject to im-

---

harbor only for prosecutors who comply with its terms. *See United States v. Durkee Famous Foods, Inc.*, 306 U.S. 68, 70-71 (1939).

prisonment, would face twice the potential amount in fines.

The Ninth Circuit dismissed the obvious increase or broadening of the potential penalties, in plain contravention of *Stirone,* by relying on two decisions of that circuit holding that an increase in potential penalties did not, *per se,* lead to a presumption of prosecutorial vindictiveness. *See Brooklier,* 685 F.2d at 1215; *Banks,* 682 F.2d at 845. These decisions are not at all relevant to the issue raised by this case, however, as neither of those decisions involved the issue whether a superseding indictment was impermissibly broadened after the running of a statute of limitations. Under *Stirone,* the standard is whether the change is trivial, useless or innocuous. A potential doubling of the monetary fines or a potential 60 percent increase in the term of imprisonment cannot, as a matter of law, be considered trivial.

Moreover, as in *Stirone,* there was nothing trivial, useless or innocuous in the expanded avenues of proof available to the Government under the superseding indictment against Sears. The substance of the single count indictment in *Stirone* was that the defendant illegally obstructed interstate commerce in violation of 18 U.S.C. § 1951 by interfering with the receipt of sand for use in the manufacture of ready mix concrete. *See United States v. Stirone,* 262 F.2d 571, 574 (3d Cir. 1958), *aff'g* 168 F. Supp. 490 (W.D. Pa. 1957). The indictment mentioned that the concrete was for use in the construction of a steel plant, a fact which, as the court of appeals observed, placed the defendant on notice of the Government's alternate basis for proving a violation of 18 U.S.C. § 1951. 262 F.2d at 574. Although the defendant was not surprised by the prosecution's alternative avenue of proof (the defendant directed argument on this point in its claim that the affected steel shipments were not covered by the statute),

this Court held that proof of an effect on interstate steel shipments constituted an impermissible broadening of the indictment. *Stirone,* 361 U.S. at 219.

Like the court of appeals in *Stirone,* the Ninth Circuit relied on the fact that Sears was aware prior to return of the superseding indictment of the Government's alternate theory. *Sears, Roebuck & Co.,* 785 F.2d at 779. But the Government's alternate theory that Sears tried to evade anti-dumping duties imposed under 19 U.S.C. § 1673, and not just *ad valorem* duties collected under 19 U.S.C. § 1500, is indistinguishable from the alternate basis at issue in *Stirone.* Under the original indictment, Sears was prepared to defend the charge, *inter alia,* on the ground that the Customs Service ignored the prices listed on the import documents and assessed *ad valorem* duties on the value the goods would have been sold for under the Japanese MITI check prices. In contrast, under the superseding indictment, the Govenment's case would rest on such issues as whether Sears was potentially liable for special anti-dumping duties, whether the statements in the documents provided by Sears which the Government claims are false were capable of affecting the Government's assessment of anti-dumping duties, and whether Sears entered into an agreement with alleged co-conspirators to avoid anti-dumping duties. The superseding indictment therefore brought into play new proof which would not have supported a conviction under § 542.

The Ninth Circuit also justified its decision on the basis that, notwithstanding the greater penalties and the expanded avenues of proof permitted under the § 1001 charges, these charges were included offenses of § 542 under the test established in *Blockburger v. United States,* 284 U.S. 299 (1932). *See Sears, Roebuck & Co.,* 785 F.2d at 779, citing *United States v. Rose,* 570 F.2d 1358, 1363 (9th Cir. 1978) where the Ninth Circuit held that § 1001 is

included in § 542 under the *Blockburger* test. However, the abstract question of whether § 542 and § 1001 are separate offenses under the *Blockburger* test is beside the point. The *Blockburger* test is designed to determine whether there is a presumption of legislative intent to preclude cumulative punishment. Even assuming that § 1001 is deemed "included" in § 542 for this purpose,[3] the new § 1001 charges in the superseding indictment had the purpose and effect of opening up broader avenues of proof. § 1001 has broader definitions of materiality and intent than § 542; it was precisely to avail itself of these broader definitions, and thereby to seek to obtain a conviction on proof which would not have sufficed under § 542, that the Government obtained the superseding indictment. Otherwise, there would have been no need to amend the charges in the first place. Given the fact that the § 1001 charges expanded the avenues of proof, it is of no consequence that these charges might be deemed "included" in § 542 for the wholly separate purpose of preventing unwarranted cumulative punishment.

In sum, like the defendant in *Stirone,* Sears faced a much broader theory of prosecution in the superseding indictment. Because the broadening of an indictment

---

[3]This assumption may be incorrect, especially in light of *United States v. Woodward,* 469 U.S. 105 (1985), where this Court reversed the Ninth Circuit's decision that § 1001 was a lesser included offense of the misdemeanor of failing to report currency upon entry into the United States. There is language in § 542 ("or by means of any false or fraudulent practice or appliance") which might permit a conviction under § 542 for bringing prohibited merchandise into the country through some fraudulent means which does not involve making a false statement. In that event, under the same reasoning this Court used in *Woodward,* the conduct prohibited by § 542 would not constitute a violation of § 1001, and the two statutes would therefore constitute separate offenses under the test established in *Blockburger.*

after the running of the statute of limitations creates an irrebutable presumption of prejudice, *see Marion*, 404 U.S. at 322, the Government was simply too late in bringing these expanded charges. The indictment was properly dismissed by the district court.

D. Review of the Important Federal Issue Presented Would Facilitate the Administration of the Criminal Justice System

Granting the writ of certiorari would enable the court to address this recurring issue[4] and resolve the conflict created by the decisions below. Only two terms ago, the Court addressed the issue whether an indictment can be narrowed in the defendant's favor. *See United States v. Miller*, 471 U.S. 130 (1985). This case presents the opportunity to address the question of what constitutes an impermissible broadening of an indictment. Since this case arises in the context of a superseding indictment, the Court would have the opportunity to apply its prior decision in *Stirone* to establish a bright line rule that any change in an indictment that increases the potential penalty or relies on a new charge that is not a lesser included offense of the previous offense constitutes an impermissible broadening of the indictment.[5] Such a rule would guide the courts in determining what constitutes a

---

[4] *See, e.g., United States v. Edwards*, 777 F.2d 644, 649 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1644 (1986); *United States v. Friedman*, 649 F.2d 199, 204 (3d Cir. 1981); *United States v. Grady*, 544 F.2d 598, 602 (2d Cir. 1976); *United States v. Wilsey*, 458 F.2d 11, 12 (9th Cir. 1972); *United States v. Garcia*, 412 F.2d 999, 1000-1001 (10th Cir. 1969).

[5] *Cf. Harris v. Oklahoma*, 433 U.S. 682 (1977) (double jeopardy clause bars prosecution on lesser included offense after conviction on greater offense); *Brown v. Ohio*, 432 U.S. 161, 168-169 (1977) (Double jeopardy clause bars prosecution on greater offense after conviction on lesser included offense).

proper amendment of an indictment. In addition, the rule would guide prosecutors in determining when a new indictment was necessary or whether a superseding indictment could be filed at all. Thus, this case raises a substantial question of federal law that, if settled, would facilitate the administration of criminal justice.

III

THE DECISION BELOW IS RIPE FOR REVIEW

The Ninth Circuit reversed the district court's decision dismissing the indictment and remanded the case for trial. Jurisdiction exists under 28 U.S.C. § 1254, nevertheless, to review decisions of the courts of appeals which do not represent final judgments. *See, e.g., Forsyth v. City of Hammond*, 166 U.S. 506 (1897). This Court has repeatedly exercised its discretion to review issues on certiorari prior to final judgment, where, as here, "the interest of judicial economy" is better served by a prompt resolution of the questions presented than by postponement of review until entry of a final judgment. *See Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting from the Court's grant of certiorari).

Judicial economy would be best served by reviewing the question presented at this stage. If the Ninth Circuit's decision is reversed, there will be no trial. Because the district court decision reviewed by the Ninth Circuit represented a final judgment — the dismissal of the indictment — no further proceedings would be required if the trial court's decision was proper. This Court has granted review in similar circumstances where further proceedings might be avoided by resolution of the issue on certiorari. *See, e.g., Estelle v. Gamble*, 429 U.S. 97 (1976) (reviewing interlocutory decision of a court of appeals reinstating a complaint dismissed by the district court); *Fong Foo v. United States*, 369 U.S. 141, 142

(1962) (certiorari granted to consider court of appeals' grant of writ of mandamus ordering that the defendant be retried following the district court's entry of a directed verdict); *Larsen v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 684-685 (1949) (reviewing interlocutory decision of court of appeals reinstating a complaint dismissed for lack of jurisdiction).

Delaying review of the question presented until after trial would therefore be inappropriate. If Sears is acquitted, the Ninth Circuit's incorrect decision will remain, but this Court will have lost the opportunity to correct it. Sears will have been subjected needlessly to a criminal trial based on an improper indictment. Accordingly, this Court should exercise its discretion to review the issue presented in this petition for certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit in this case.

Dated: October 20, 1986

Respectfully submitted,

LATHAM, WATKINS & HILLS
IRWIN GOLDBLOOM
(Attorney of record)
MAUREEN E. MAHONEY
SCOTT G. KNUDSON
1333 New Hampshire Avenue, N.W.
Suite 1200
Washington, D.C. 20036
(202) 828-4400

STEPHEN D. MILLER, INC.
STEPHEN D. MILLER
GEORGE W. BUEHLER
DAVID G. MEYER
8912 West Olympic Boulevard
Beverly Hills, California 90211
(213) 858-8282

Attorneys for Petitioner
Sears, Roebuck and Co.

APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-5296
DC No. Cr 80-183-(A)-R

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

SEARS, ROEBUCK & COMPANY, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Filed: March 25, 1986 Cathy A. Catterson, Clerk
U.S. Court of Appeals

Argued and Submitted August 5, 1985 —
Pasadena, California

Before: SKOPIL and CANBY, Circuit Judges, and SOLOMON,* District Judge

PER CURIAM:

The government appeals the dismissal of the superseding indictment on the ground that it broadened the original indictment and was therefore barred by the five

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

year statute of limitations contained in 18 U.S.C. § 3282. We reverse and remand this case for assignment to a different judge.

I

Once an indictment is returned the statute of limitations is tolled as to the charges contained in the indictment. *United States v. Wilsey,* 458 F.2d 11, 12 (9th Cir. 1972). A superseding indictment returned while the first indictment is pending is timely unless it "broaden[s] or substantially amend[s]" the charges in the original indictment. *United States v. Grady,* 544 F.2d 598, 602 (2d Cir. 1976). *See also United States v. Friedman,* 649 F.2d 199, 203-04 (3d Cir. 1981); *United States v. Charnay,* 537 F.2d 341, 354 (9th Cir.), *cert. denied,* 429 U.S. 1000 (1976). To determine whether the superseding indictment impermissibly changed the charges in the original indictment it is necessary to examine the two indictments carefully. *Charnay,* 537 F.2d at 354; *see also Mende v. United States,* 282 F.2d 881, 883 (9th Cir. 1960), *cert. denied,* 364 U.S. 933 (1961).

The original indictment charges twelve substantive violations of 18 U.S.C. § 542, while the superseding indictment charged, based on the same conduct, twelve substantive violations of 18 U.S.C. § 1001. The original indictment also charged a conspiracy to violate 18 U.S.C. § 542 and to defraud the United States by impairing the customs service's attempt to learn the price and duties to be collected on imported television receivers. The conspiracy charged in the superseding indictment deleted all references to violations of 18 U.S.C. § 542. In other respects the conspiracy charge substantially resembled that charged in the original indictment with the exception of an additional parenthetical reference to dumping duties.

The substitution of the general false statement provision in 18 U.S.C. § 1001 for the more specific false statement provision in 18 U.S.C. § 542 did not expand or broaden the charges against Sears, since all the elements of a section 1001 prosecution are included in a section 542 charge. *United States v. Rose,* 570 F.2d 1358, 1363 (9th Cir. 1978). Nor did the addition of a reference to dumping duties constitute a substantial change in the superseding indictment. *See Friedman,* 649 F.2d at 204 (factual allegations in a superseding indictment did not change although some additional details were added). The government from the outset made Sears aware of its concern with alleged attempts by Sears to circumvent these duties. *See United States v. Sears,* 719 F.2d 1386, 1388 (9th Cir. 1983) (in a previous appeal, this court noted that a possible motive for Sears' alleged false statements was "to avoid dumping duties. . . ."), *cert. denied,* 465 U.S. 1079, 104 S. Ct. 1441 (1984).

Finally, the potential for imposition of a greater penalty under section 1001 does not render the charges in the superseding indictment broader than those in the original indictment. *Cf. United States v. Banks,* 682 F.2d 841, 845 (9th Cir. 1982) (a superseding indictment that provided a potentially higher penalty than the original indictment was upheld), *cert. denied,* 459 U.S. 1117 (1983); *accord United States v. Brooklier,* 685 F.2d 1208, 1215-16 (9th Cir. 1982), *cert. denied,* 459 U.S. 1206 (1983).

II

The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). In addition,

> [t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106.

These statutes, as well as the court's inherent authority, allow it to direct that a case on remand be assigned to a different judge. *Sederquist v. City of Tiburon,* 765 F.2d 756, 763 (9th Cir. 1984); *Tanner Motor Livery, Ltd. v. Avis, Inc.,* 316 F.2d 804 (9th Cir.), *cert. denied,* 375 U.S. 821 (1963) (28 U.S.C. § 2106); *United States v. Ritter,* 273 F.2d 30 (10th Cir. 1959), *cert. denied,* 362 U.S. 950 (1960) (inherent authority and All Writs Act); *see generally Barber v. United States,* 711 F.2d 128 (9th Cir. 1983).

Ordinarily, further proceedings in a case remanded to the district judge are conducted by the judge who originally tried the case. But, on rare occasions, both for the judge's sake and the appearance of justice, an assignment to a different judge is desirable. The remand does not imply any personal grievance against the judge.

In the absence of proof of personal bias, we remand to a new judge only under "unusual circumstances." *United States v. Arnett,* 628 F.2d 1162, 1165 (9th Cir. 1979) (quoting *United States v. Robin,* 553 F.2d 8, 10 (2d Cir. 1977) (*en banc*)). In making this determination we consider

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous

> or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Arnett, 628 F.2d at 1165 (quoting *United States v. Robin,* 553 F.2d at 10). The first two of these factors are of equal importance, and a finding of one of them would support a remand to a different judge. *See United States v. Alverson,* 666 F.2d 341, 349 (9th Cir. 1982). A district judge's adamance in making erroneous rulings may justify remand to a different judge. *See United States v. Doe,* 655 F.2d 920, 929 (9th Cir. 1981). *See also United States v. Larios,* 640 F.2d 938, 943 (9th Cir. 1981) (remand for resentencing before different judge where original judge had unreasonably refused to wait for transcript of former proceedings before sentencing and was adamant in his belief as to defendant's culpability; he therefore could not reasonably be expected to ignore his conclusions and the appearance of fairness required reassignment); *United States v. Ferguson,* 624 F.2d 81 (9th Cir. 1980) (remand to new judge where original judge created error by refusing to consider mitigating factors before sentencing, where refusal to consider those factors was inconsistent with the need to preserve the appearance of justice and where reassignment would mean little duplication of efforts); *United States v. Arnett,* 628 F.2d at 1165 (declining to remand to a new judge where no injustice was threatened and reassignment would have caused considerable waste of time and duplication of effort).

There is no suggestion in any of the case law that the district court as an institution must first be given the opportunity to consider whether to reassign a case. If the request for reassignment after remand were made of the district judge by a party on bias grounds, the judge's

refusal would be directly reviewable in this court by mandamus petition.

Nor do we believe that the statutory provisions concerning disqualification of judges, 28 U.S.C. §§ 144, 455 (1982), pose an obstacle to this court's ordering reassignment on remand. The disqualification statutes provide a method whereby a party to an action may request a judge to disqualify himself on the grounds of bias. *Id.* Our situation is distinguishable. We are not acting under the disqualification statutes, which a party must first invoke before the district court. Instead, this court is being asked in the first instance to exercise its inherent power to administer the system of appeals and remands by ordering a case reassigned on remand. The basis for the reassignment is not actual bias on the part of the judge, but rather a belief that the healthy administration of the judicial and appellate processes, as well as the appearance of justice, will best be served by such reassignment. We do not believe that the statutory provisions concerning disqualification are either exhaustive or the exclusive method whereby a judge may be removed from hearing a case. As the Second Circuit decision in *United States v. Robin* indicates, the appellate court's authority to reassign exists apart from the judicial disqualification statutes. *See* 553 F.2d at 11. There is simply nothing in the disqualification statutes to prohibit this court from taking appropriate action in the first instance.

We believe the appearance of justice and the orderly administration of this court's appellate docket would best be served by remand to another judge. This is the fourth pretrial appeal in this case; and the third time the government has appealed from dismissal of the indictment. Even before trial, this case has consumed a tremendous amount of this court's judicial resources and time. This court's orderly administration of its own docket is threatened by

the exertion of effort and the expenditure of time on repeated pretrial appeals in one case.

The district judge has been adamant in his rulings. The district judge has twice dismissed the original indictment emphatically condemning the conduct of the government and the prosecuting attorney. At a hearing before the district court, following this court's reversal of that court's first dismissal, the district court stated that:

> I think this is one of the most egregious cases I have ever, ever known about in my career as a lawyer. I think . . . if I had been the United States Attorney at that time, I would have fired [the original prosecutor] on the spot . . .
>
> The government hid behind that [grand jury] procedure . . . didn't want to bite the bullet . . .
>
> Obviously the Department of Justice didn't listen to [my prior opinion dismissing this case], didn't read it as such . . . to put [the original prosecutor] on other cases after that.

(Government's Br. at p. 44). The district court then dismissed this indictment a second time. The second dismissal, which followed a remand from this court directing reinstatement of the indictment, was summarily reversed. The district judge then dismissed this matter for a third time concluding, without making any findings, that the superseding indictment was time-barred. In so ruling, the district judge renewed his condemnation of the government stating "[t]he conduct . . . of the government in this case has been outrageous from the beginning and it has not ceased. It has not ceased." (Govt. Br. at 10). The district judge's statements and conduct evidence an appearance of his unwillingness to preside in this case.

Remand of this case, like those cases remanded to a new sentencing judge, would entail minimal duplication

of effort and waste. *See Doe,* 655 F.2d at 929; *Ferguson,* 624 F.2d at 84. The superseding indictment in this case was returned before the defendant was ever tried on the first indictment. While the district judge's acquaintance with pretrial matters might expedite the trial on the superseding indictment, any duplication of time would not be so great as to be "out of proportion to any gain in preserving the appearance of fairness." *Arnett,* 628 F.2d at 1165 (quoting *United States v. Robin,* 553 F.2d at 10).

REVERSED and REMANDED with instructions that this case be reassigned on remand.

APPENDIX B

ORDER DISMISSING FIRST SUPERSEDING INDICTMENT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 80-183(A)R

UNITED STATES OF AMERICA,
Plaintiff,
vs.
SEARS, ROEBUCK AND COMPANY,
INCORPORATED,
Defendant.

FILED: October 3, 1984
Clerk, U. S. District Court,
Central District of California

On October 1, 1984, in the Courtroom of the Honorable Manuel L. Real, United States District Judge, the Motion of Defendant Sears, Roebuck And Co. For Dismissal of Superseding Indictment Based Upon Bar of The Statute of Limitations Contained In 18 U.S.C. § 3282 was brought before the Court for hearing;

Plaintiff United States of America was represented by Assistant United States Attorneys Herbert B. Hoffman and Victor D. Stone, and Defendant Sears, Roebuck and Co. was represented by Stephen D. Miller, Thomas J. Nolan, and George W. Buehler;

Upon considering the pleadings, files and records in this action, together with the papers filed and the evidence and argument offered in support of and in opposi-

tion to the motion, and the Court having found that the First Superseding Indictment is barred by the five-year statute of limitations contained in 18 U.S.C. § 3282;

IT IS HEREBY ORDERED:

The First Superseding Indictment and each count thereof are dismissed based on the five-year statute of limitations contained in 18 U.S.C. § 3282.

DATED: _____, 1984

MANUEL L. REAL
United States District Judge

APPENDIX C

ORDER

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 84-5296

DC No. CR 80-183-(A)-R

UNITED STATES OF AMERICA,
Appellant,

vs.

SEARS, ROEBUCK & COMPANY, INC.,
Appellee.

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Before: SKOPIL and CANBY, Circuit Judges, and SOLOMON, District Judge*

Filed: August 20, 1986 Cathy A. Catterson, Clerk
U.S. Court of Appeals

The panel has voted to deny the petition for rehearing. Judges Skopil and Canby have voted to reject the suggestion for rehearing en banc, and Judge Solomon recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

September 1978 Grand Jury

UNITED STATES OF AMERICA
Plaintiff,

v.

SEARS, ROEBUCK AND COMPANY,
INCORPORATED,
Defendant.

No. _____

Indictment

[18 U.S.C. § 371: Conspiracy; 18 U.S.C. § 542: Entry of Merchandise into the commerce of the United States by means of false statements.]

COUNT ONE

[18 U.S.C. § 371]

A. INTRODUCTION

At all times relevant herein, SEARS, ROEBUCK AND COMPANY, INCORPORATED (hereinafter "SEARS") was a United States Corporation, incorporated in the State of New York, headquartered in Chicago, Illinois and doing business through its corporate agents in Los Angeles and the Central District of California and elsewhere, with a general business purpose of purchasing, importing and selling consumer merchandise, including television receivers.

B. THE CONSPIRACY

Beginning in or about 1966, the exact date being unknown to the grand jury, and continuing until in or about July 1975, within the Central District of California and elsewhere, the defendant SEARS, with other individual and corporate unindicted co-conspirators, both known and unknown to the grand jury, did knowingly and willfully conspire together and with each other to defraud the United States of America by impairing, obstructing, and defeating the lawful governmental function of the United States Customs Service, a department of the United States Department of the Treasury, an agency of the United States, in the ascertaining of the purchase price and amounts of duty to be collected on television receivers, and to commit offenses against the United States, namely, to enter and introduce and to attempt to enter and introduce, into the commerce of the United States, imported merchandise, that is, television receivers, by means of material false and fraudulent statements, declarations and invoices as to the purchase price of the

television receivers, in violation of Title 18, United States Code § 542.

C. OBJECTS OF THE CONSPIRACY

The objects of the conspiracy were to be accomplished as follows:

(a) Beginning in or about April 1966 through July 1975, defendant SEARS, through its co-conspirator agents and employees with other conspirator corporations and employees thereof which were engaged in the manufacture and sale of television receivers, would and did devise a scheme in which the defendant SEARS and its co-conspirators would circumvent the export licensing regulations for television receivers from Japan, by making and filing of false invoices, contracts and other documents with the Japanese government which would not and did not disclose kickbacks, rebates and credits privately arranged between SEARS and its co-conspirators, in connection with the sale and purchase of television receivers.

(b) Defendant SEARS would and did make payments for purchases of particular television receivers and filed and caused to be filed false and fraudulent statements, invoices and documents with the United States Government which purportedly represented the purchase price of said television receivers, but which would not and did not disclose the kickbacks, rebates and credits privately arranged between defendant SEARS and its co-conspirators engaged in the manufacture and sale of the television receivers.

D. OVERT ACTS

In furtherance of the conspiracy and to affect the objects thereof, defendant SEARS, with its co-conspira-

tors, committed various overt acts in the Central District of California and elsewhere, including the following:

a. In or about April 1966, defendant SEARS, through its corporate agent and employee Jerome Brennan, held a meeting concerning the sale and importation and entry of television receivers.

b. In or about April 1966, Jerome Brennan met with his superior also employed by defendant SEARS, John Amato, concerning the importation and entry of television receivers.

c. In or about December 1970, Jerome Brennan met with several corporate agents and employees of defendant SEARS, including Frank Parsons, Richard Robinson and John Amato, at SEARS headquarters in Chicago, Illinois, concerning the imporation and entry of television receivers.

d. In or about December 1971, Jerome Brennan held a meeting with other corporate agents and employees of defendant SEARS, including Charles W. Harper, Staff Assistant to James Button, Executive Vice-President for merchandising for defendant SEARS concerning the importation and entry of television receivers.

e. On or about October 25, 1971, Frank Oyama sent a memorandum to Jerome Brennan.

f. On or about September 26, 1968, Jerome Brennan sent a telegram to Frank Iijima, corporate agent and employee of defendant SEARS requesting that Frank Iijima set up a meeting with an employee of a Japanese manufacturer of television receivers which had sold television receivers to defendant SEARS.

g. On or about December 3, 1970, Jerome Brennan sent a telegram to Frank Iijima.

h. At a date unknown to the grand jury, Frank Oyama made a note concerning the purchase, importation and entry of television receivers.

i. On or about February 18, 1972, Jerome Brennan sent a telegram to Frank Oyama.

j. On or about May 16, 1972, Frank Hendrix, corporate agent and employee of defendant SEARS sent a letter to a corporate agent and employee of a Japanese manufacturer of television receivers which had sold television receivers to defendant SEARS, stating losses incurred by defendant SEARS on the so-called "miniscan," and a demand for reimbursement by a Japanese manufacturer of television receivers which had sold television receivers to defendant SEARS in the amount of $518,000.

k. On or about May 22, 1972, corporate agents and employees of defendant SEARS, Jerome Brennan and Richard Robinson held a meeting with corporate agents and employees of a Japanese manufacturer of television reveivers which had sold television receivers to defendant SEARS regarding the return of money to defendant SEARS.

l. On or about June 16, 1972, Jerome Brennan prepared a hand written note regarding the importation and entry of television receivers.

m. In or about August 1972, defendant SEARS, through its corporate agent and employee Jerome Brennan, sent a letter to a Japanese manufacturer of television receivers which had sold television receivers to defendant SEARS.

n. On or about August 7, 1972, defendant SEARS and a Japanese manufacturer of television receivers which had sold television receivers to defendant

SEARS signed and executed a document known as the "Memorandum of Mutual Intentions."

o. On or about August 8, 1972, defendant SEARS and a Japanese manufacturer of television receivers which had sold television receivers to defendant SEARS exchanged a document known as "Memorandum of Mutual Intentions."

p. On or about August 10, 1972, Jerome Brennan sent a letter to an employee of a Japanese manufacturer of television receivers which had sold television receivers to defendant SEARS.

q. On or about September 13, 1972, Jerome Brennan sent a letter requesting an answer by October 1st regarding his letter of August 10, 1972. Hand written in the upper right hand corner of this letter is the notation "Check Rcvd via Telegraph 9/29/72."

r. On or about September 29, 1972, a Japanese manufacturer of television receivers which had sold television receivers to defendant SEARS sent a check to defendant SEARS.

s. In or about October 1972, Jerome Brennan prepared a hand written note regarding the importation and entry of television receivers.

t. From the period January 8, 1973 to September 1, 1975, 14 Quarterly Billing Schedules were sent from the office of defendant SEARS in Tokyo, to defendant SEARS headquarters in Chicago, Illinois.

u. On or about March 1, 1973, Jerome Brennan sent a letter to Frank Oyama requesting a new billing schedule for the first quarter of 1973.

v. On or about March 18, 1974, Frank Oyama sent a telegram to Jerome Brennan.

w. On or about October 24, 1972, a meeting was held between corporate agents and employees of defendant SEARS and corporate agents and employees of a Japanese manufacturer of television receivers which had sold television receivers to defendant SEARS, concerning the sale, importation and entry of television receivers.

x. On or about October 24, 1974, Frank Oyama wrote a memorandum concerning a meeting between corporate agents and employees of defendant SEARS and corporate agents and employees of a Japanese manufacturer of television receivers which had sold television receivers to defendant SEARS.

y. On or about November 7, 1974, Kent Flummerfelt sent a telegram to Frank Oyama.

z. On or about November 8, 1974, Frank Oyama sent a telegram to Kent Flummerfelt.

aa. On or about January 30, 1975, a meeting was held between Dennis R. Allen, corporate agent and employee of defendant SEARS and corporate agents and employees of a Japanese manufacturer of television receivers which had sold television receivers to defendant SEARS.

bb. On or about January 31, 1975, a meeting was held between Dennis R. Allen, corporate agent and employee of defendant SEARS and corporate agents and employees of a Japanese manufacturer of television receivers which had sold television receivers to defendant SEARS.

cc. On or about February 4, 1975, Dennis R. Allen wrote a memorandum.

dd. On or about April 14, 1975, Frank Oyama filed a trip report regarding a meeting with corporate

agents and employees of a Japanese manufacturer of television receivers which had sold television receivers to defendant SEARS.

On or about the dates hereinafter specified, designated further by the corresponding entry number, defendant SEARS entered television receivers into the commerce of the United States:

Overt Acts	Entry Number	Date
ee	75-172573	12-16-74
ff	75-172574	12-16-74
gg	75-172997	12-17-74
hh	75-175447	12-23-74
ii	75-177023	12-26-74
jj	75-211051	03-31-75
kk	75-216801	04-17-75
ll	75-217936	04-22-75
mm	75-218122	04-22-75
nn	75-221483	04-30-75
oo	75-221482	04-30-75
pp	76-111354	07-30-75

On the dates hereinafter specified, designated further by check number and amount, a Japanese manufacturer of television receivers paid rebates to defendant SEARS from purchases of television receivers made by defendant SEARS from the Japanese manufacturer:

Overt Acts	Date	Check Number	Amount
qq	06-1-68	4030	$ 95,250
rr	04-8-69	5259	128,980
ss	07-21-70	6583	131,932.42
tt	11-22-71	150294	405,851.25
uu	08-29-72	158565	357,400

COUNTS 2 THROUGH 13

On or about the dates hereinafter specified in Counts two through thirteen, in the Central District of California, the defendant SEARS did knowingly and willfully enter and introduce into the commerce of the United States, and attempt to enter and introduce into the commerce of the United States, imported merchandise, that is, television receivers, by means of false and fraudulent invoices, statements, declarations, affidavits and certain other papers, to wit: Customs Consumption Entries (Form 5701) and Special Customs Invoices (Form 5515), said statements, invoices, declarations, affidavits and papers being hereinafter described by "Entry Number" and "Date of Entry," which documents were materially false and fraudulent in that they contained false statements and omissions of material facts as to the purchase price of the merchandise on said invoices, declarations, affidavits and papers, all in violation of Title 18, United States Code, Section 542:

Count	Entry Number	Date	Entered Value	Actual Value
2	75-172573	12-16-74	$ 70,053	$72,982
3	75-172574	12-16-74	67,468	68,894
4	75-172997	12-17-74	89,742	92,297
5	75-175447	12-23-74	38,885	41,732
6	75-177023	12-26-74	95,894	101,083
7	75-211051	03-31-75	107,513	111,389
8	75-216801	04-17-75	50,480	52,635
9	75-217936	04-22-75	95,183	99,232
10	75-218122	04-22-75	90,902	100,478
11	75-221483	04-30-75	92,506	99,148
12	75-221482	04-30-75	53,590	55,874
13	75-111354	07-30-75	602,434	598,399

A TRUE BILL

Foreman

ANDREA SHERIDAN ORDIN
United States Attorney

JULIAN S. GREENSPUN
Deputy Chief, General Litigation
and Legal Advice Section
Criminal Division
Department of Justice
Washington, D.C. 20530

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

February 1983 Grand Jury

UNITED STATES OF AMERICA,
Plaintiff,
v.
SEARS, ROEBUCK AND COMPANY,
INCORPORATED,
Defendant.

CR. NO. 80-183-(A)-R

First Superseding Indictment

[18 U.S.C. § 371:
Conspiracy
18 U.S.C. § 1001:
False Statements]

The grand jury charges:

COUNT ONE
[18 U.S.C. § 371]

A. INTRODUCTION

1. At all times relevant herein, SEARS, ROEBUCK AND COMPANY, INCORPORATED (hereinafter "SEARS") was a United States corporation, incorporated in the State of New York, headquartered in Chicago, Illinois and doing business through its corporate agents in Los Angeles and the Central District of California and elsewhere, with a general business purpose of purchasing, importing and selling merchandise, including television receivers.

2. At all times relevant herein, and continuing up to February 28, 1973, the Ministry of International Trade and Industry (MITI) of the Government of Japan established minimum prices (called "check prices") relating to the exportation of television receivers from Japan to the United States. In order to obtain an export license for Japanese manufactured television receivers to the United States, the purchase price of said television receivers must have been at or above the check price.

3. At all times relevant herein, the Antidumping Act, 19 U.S.C. § 160 *et seq.*, provided for the imposition of special dumping duties upon a determination that foreign merchandise was imported into the United States at less than fair value and that these importations caused injury to an industry of the United States. On March 10, 1971, pursuant to the provisions of the Antidumping Act, a public finding of dumping was made by the Secretary of the Treasury with respect to television receivers manufactured in Japan.

B. THE CONSPIRACY

Beginning in or about August, 1968, the exact date being unknown to the grand jury and continuing until in or about October, 1975, within the Central District of California and elsewhere, the defendant SEARS, with other individual and corporate unindicted co-conspirators, both known and unknown to the grand jury, did knowingly and willfully conspire together and with each other to defraud the United States of America by impairing, obstructing, and defeating the lawful governmental functions of the United States Customs Service, a department of the United States Department of the Treasury, an agency of the United States, in the ascertaining of the invoice purchase price, value, and amounts of duty to be collected (including potential dumping duties) on im-

ported television receivers, through false and fraudulent statements and representations of material facts to the United States Customs Service in connection with the importation of said television receivers into the United States as set forth below, in violation of Title 18, United States Code, Section 371.

C. OBJECTS OF THE CONSPIRACY

The objects of the conspiracy were to be accomplished as follows:

(a) Defendant SEARS would and did make payment for purchases of particular television receivers and filed and caused to be filed false and fraudulent statements, invoices and documents with the United States Government which purportedly represented the purchase invoice price of said television receivers, but which would not and did not disclose the various schemes, fictitious adjustments, secret rebates, and credits privately arranged between the defendant SEARS and its co-conspirators in order to avoid the proper application of the Antidumping Act and the imposition of special dumping duties. This object was accomplished by the following schemes, among others:

1. A scheme occurring between April, 1973 and October, 1975, which provided for the "overbilling" on television receivers manufactured in Japan and the "underbilling" on television receivers manufactured in Korea;

2. A scheme occurring between May, 1972 and October, 1972 which provided for a co-conspirator to pay, and defendant SEARS to receive, a secret rebate payment in the amount of $490,537, which was disguised as the reimbursement of merchandise losses on "miniscan devices" previously pur-

chased by defendant SEARS from the co-conspirator.

3. A scheme occurring between August, 1968 and February, 1973 which provided for the circumvention of the MITI export licensing regulations for television receivers from Japan through the fraudulent inflation of purchase prices for said television receivers in order to give the appearance that the purchase prices were at or above the check prices established by MITI.

D. OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, defendant SEARS, with its co-conspirators, committed various overt acts in the Central District of California and elsewhere, including the following:

(a) In or about December, 1970, Jerome Brennan met with several other corporate agents and employees of defendant SEARS, including Frank Parsons, Richard Robinson and John Amato, at SEARS headquarters in Chicago, Illinois, concerning the importation and entry of television receivers.

(b) In or about December, 1971, Jerome Brennan held a meeting with other corporate agents and employees of defendant SEARS, including Charles W. Harper, Staff Assistant to James Button, Executive Vice-President for Merchandising for defendant SEARS concerning the importation and entry of television receivers.

(c) On or about October 25, 1971, Frank Oyama, a corporate agent and employee of defendant SEARS in Tokyo, Japan, sent a memorandum to Jerome Brennan at defendant SEARS' headquarters in Chicago, Illinois.

(d) On or about February 18, 1972, Jerome Brennan sent a telegram to Frank Oyama in Tokyo, Japan.

(e) On or about May 16, 1972, Frank Hendrix, a corporate agent and employee of defendant SEARS, drafted a letter to a corporate agent and employee of Tokyo Shibaura Electric Company, Ltd. ("Toshiba"), listing losses incurred by defendant SEARS on "miniscan" devices and including a demand for reimbursement in the amount of $945,416.

(f) On or about May 22, 1972, corporate agents and employees of defendant SEARS, John Rehm, Jerome Brennan and Richard Robinson held a meeting with corporate agents and employees of Toshiba, including Shunichi Murao, regarding the reimbursement of money to defendant SEARS as a result of overpayments for television receivers by defendant SEARS to Toshiba.

(g) On or about June 16, 1972, Jerome Brennan prepared a worksheet regarding the importation and entry of television receivers purchased from Toshiba.

(h) On or about August 10, 1972, Jerome Brennan sent a letter and SEARS invoice no. 515824 in the amount of $490,537 to M. Moriyama, an employee of Toshiba in Tokyo, Japan.

(i) On or about September 13, 1972, Jerome Brennan sent a letter to K. Kobayashi, an employee of Toshiba America, Inc. in Chicago, Illinois, requesting an answer by October 1st to his letter of August 10, 1972. Handwritten in the upper right-hand corner of this letter is the notation "Check Rcvd via Telegraph 9/29/72."

(j) On or about September 29, 1972, Toshiba sent a payment to defendant SEARS in the amount of $490,537.

(k) From the period January 8, 1973 to September 1, 1975, 14 Quarterly Billing Schedules were sent from the office of defendant SEARS in Tokyo, Japan to defendant SEARS' headquarters in Chicago, Illinois.

(l) On or about March 1, 1973, Jerome Brennan sent a letter to Frank Oyama in Tokyo, Japan, requesting a new billing schedule for the first quarter of 1973.

(m) On or about September 24, 1974, Frank Oyama wrote a memorandum concerning a meeting between corporate agents and employees of defendant SEARS and corporate agents and employees of Toshiba.

(n) On or about November 7, 1974, James Flummerfelt, a corporate agent and employee of defendant SEARS, sent a telegram to Frank Oyama in Tokyo, Japan.

(o) On or about November 8, 1974, Frank Oyama sent a telegram from Tokyo, Japan to James Flummerfelt in Chicago, Illinois.

(p) On or about April 14, 1975, Frank Oyama filed a trip report regarding a meeting with corporate agents and employees of Toshiba.

On or about the dates hereinafter specified, designated further by the corresponding United States Customs consumption entry number, within the Central District of California, defendant SEARS entered television receivers into the commerce of the United States:

Overt Acts	United States Customs Consumption Entry Number	Date
q	75-172573	12-16-74
r	75-172574	12-16-74
s	75-172997	12-17-74
t	75-175447	12-23-74
u	75-177023	12-26-74
v	75-211051	03-31-75
w	75-216801	04-17-75
x	75-217936	04-22-75
y	75-218122	04-22-75
z	75-221482	04-30-75
aa	75-221483	04-30-75
bb	75-111354	07-30-75

All in violation of Title 18, United States Code, Section 371.

COUNTS TWO THROUGH THIRTEEN

On or about the dates hereinafter specified in Counts Two through Thirteen, in the Central District of California, the defendant SEARS, in a matter within the jurisdiction of the Department of the Treasury and the United States Customs Service, a part thereof, in connection with the importation of television receivers, did knowingly and willfully falsify, conceal and cover up material facts by scheme and device, and did knowingly and willfully make and cause to be made false, fictitious, and fraudulent statements and representations of material facts with respect to the purchase price of television receivers in the following identified documents contained in United States Customs Service consumption entries, hereinafter specified, all in violation of Title 18, United States Code, Section 1001:

Count	United States Customs Consumption Entry Number	Date	Document	False Purchase Price and Entered Value	True Purchase Price and Value
2	75-172573	12-16-74	Consumption Entry (Form 7501)	$ 70,053	$ 72,982
			Special Customs Inv. (Form 5515)	$ 70,053	$ 72,982
			Commercial Invoice Nos. KT 74-0527; 74-0529; 74-0530.	$ 70,053	$ 72,982
3	72-172574	12-16-74	Consumption Entry (Form 7501)	$ 67,468	$ 72,115
			Special Customs Inv. (Form 5515)	$ 67,468	$ 72,115
			Commercial Invoice Nos. KT 74-0512; 74-0516.	$ 67,468	$ 72,115
4	75-172997	12-17-74	Consumption Entry (Form 7501)	$ 89,742	$ 93,867
			Special Customs Inv. (Form 5515)	$ 89,742	$ 93,867
			Commercial Invoice Nos. KT 74-0522; 74-0524; 74-0526.	$ 89,742	$ 93,867
5	75-175447	12-23-74	Consumption Entry (Form 7501)	$ 38,885	$ 41,732
			Special Customs Inv. (Form 5515)	$ 38,885	$ 41,732
			Commercial Invoice Nos. KT 74-0543; 74-0539.	$ 38,885	$ 41,732
6	75-177023	12-26-74	Consumption Entry (Form 7501)	$ 95,882	$101,280
			Special Customs Inv. (Form 5515)	$ 95,882	$101,280
			Commercial Invoice Nos. KT 74-0533; 74-0536; 74-0538; 74-0542.	$ 95,882	$101,280

Count	United States Customs Consumption Entry Number	Date	Document	False Purchase Price and Entered Value	True Purchase Price and Value
7	75-211051	03-31-75	Consumption Entry (Form 7501)	$107,480	$111,968
			Special Customs Inv. (Form 5515)	$107,480	$111,968
			Commercial Invoice Nos. KT 74-0017; 74-0021; 74-0025.	$107,480	$111,968
8	75-216801	04-17-75	Consumption Entry (Form 7501)	$ 50,455	$ 52,610
			Special Customs Inv. (Form 5515)	$ 50,455	$ 52,610
			Commercial Invoice Nos. KT 74-0038	$ 50,455	$ 52,610
9	75-217936	04-22-75	Consumption Entry (Form 7501)	$ 95,168	$ 99,217
			Special Customs Inv. (Form 5515)	$ 95,168	$ 99,217
			Commercial Invoice Nos. KT 74-0042; 74-0046.	$ 95,168	$ 99,217
10	75-218122	04-22-75	Consumption Entry (Form 7501)	$ 90,842	$100,418
			Special Customs Inv. (Form 5515)	$ 90,842	$100,418
			Commercial Invoice Nos. KT 74-0050	$ 90,842	$100,418
11	75-221482	04-30-75	Consumption Entry (Form 7501)	$ 53,483	$ 55,767
			Special Customs Inv. (Form 5515)	$ 53,483	$ 55,767
			Commercial Invoice Nos. KT 74-0062	$ 53,483	$ 55,757
12	75-221483	04-30-75	Consumption Entry (Form 7501)	$ 92,506	$ 99,148
			Special Customs Inv. (Form 5515)	$ 92,506	$ 99,148
			Commercial Invoice Nos. KT 74-0058; 74-0060; 74-0068.	$ 92,506	$ 99,148

Count	United States Customs Consumption Entry Number	Date	Document	False Purchase Price and Entered Value	True Purchase Price and Value
13	75-111354	07-30-75	Consumption Entry (Form 7501)	$602,434	$598,399
			Special Customs Inv. (Form 5515)	$602,434	$598,399
			Commercial Invoice Nos. 15D-1295; 15D-1297.	$ 56,854	$ 52,819

All in violation of Title 18, United States Code, Section 1001.

A TRUE BILL:

Foreperson

ALEXANDER H. WILLIAMS, III
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division
Acting United States Attorney

APPENDIX F

Subsidiaries and Affiliates of Sears, Roebuck and Co.

Pursuant to Rule 28.1 of the Supreme Court Rules, the Court is respectfully referred to the listing of subsidiaries and affiliates of Sears, Roebuck and Co. ("Sears") included in the Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit, No. 83-1127, filed by Sears in this action on January 6, 1984.

The following amendments to that listing represent additional subsidiaries (except wholly owned subsidiaries) and affiliates of Sears as of the date of filing of this Petition.

H-L Land Improvement Venture
H-L Mall Venture
Mason Park Property Owners Association
NewPark Mall Associates
Sears Holdings Limited (Canada)
Sears Limited
Sears (1978) Limited
Sears Acceptance Company, Inc.
Sears Properties, Inc.
S. L. H. Transport, Inc.
Kerrybrooke Development Limited (Canada)
Kingsway Imports Limited
Contill Realty (Canada)
Regbrooke Limited (Canada)
Fallowfield Developers Limited
Les Estimations Gilles Bordeleau, Inc. (Canada)
Hadee B.V.
Handelmaatschappij Aparak B.V.
Interheem B.V.
Nederlands Handelskantoor B.V.
Sears World Trade (Nederland) B.V.
Hagemeyer (London) Ltd.

Hagemeyer Finance (U.K.) Ltd.
JESKO GmbH
SWT Finance (U.K.) Ltd.
T.E.C. Service SmbH
T.E.C. Warren GmbH
Daymu-Hagemeyer (Taiwan) Co., Ltd.
Hagemeyer Export & Import Co. Ltd.
Haco Pty. Ltd.
Hagemeyer Investment Co. (Australia) Pty. Ltd.
Briscoes (New Zealand) Ltd.
L. Holt & Company Ltd.
Hagemeyer U.S.A. (Holdings), Inc.
Hagemeyer Canada Inc.
Hagemeyer (Aruba) N.V.
Hagemeyer Handelmaatschappij (St. Maarten) N.V.
Hagemeyer Salas (St. Maarten) N.V.
Hagemeyer-Winjngaarde Handelmaatschappij N.V.
Sears World Trade (Nederland) Services B.V.
Hagemeyer Caribbean Trading Co., N.V.
Hagemeyer (Curacao) N.V.
Hagemeyer Export (Aruba) N.V.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 20, 1986, I served the within Petition for a Writ of Certiorari in re: "Sears, Roebuck and Company vs. United States of America" in the United States Supreme Court, October Term 1986, No. 86 .....;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

United States Solicitor General
United States Department of Justice
Washington, D.C. 20530

and

Victor Stone, Esq.
Counsel for Special and Appellate Matters
Department of Justice
Box 887, Ben Franklin Station
Washington, D.C. 20044-0887

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 20, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA